

86-867 (1)

NO. 86 -

Supreme Court, U.S.
FILED

NOV 29 1986

JOSEPH F. SPANIOL, JR.
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

MILLER SESSION and ROSE SESSION,
Petitioners,

v.

I.T.O. CORPORATION OF AMERIPORT,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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38 pp

QUESTIONS PRESENTED

1. The New Jersey State Tort Claims Act, a comprehensive legislative program dealing with the waiver of the defense of sovereign immunity in tort actions against the State of New Jersey, provides that in tort actions against the State (a) the amount of any workmen's compensation benefits received by an injured claimant is to be made known to the Court and deducted from any damages awarded against the State, and (b) bars the payer of such workmen's compensation benefits from asserting a subrogation lien on any damages awarded the claimant. In these circumstances, was it not error for the Court below to rule --

(1) That a stevedore's lien for workmen's compensation benefits paid under the Longshoremen's and Harbor Workers' Compensation Act was not a subrogation

lien and could be asserted in an employee's damage action against the State of New Jersey; and

(2) That the settlement by a longshoreman of a damage claim against the State of New Jersey without his stevedore/employer's consent would authorize the stevedore/employer to terminate the payment of workmen's compensation benmefits?

2. Did not the Courts below err in ruling that the 1984 amendments to Section 33(f) of the Longshoremen's and Harbor Workers' Compensation Act operated to change the stevedore's lien for compensation benefits paid an injured employee from a lien based on the principle of subrogation to a general statutory right of recovery?

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MILLER SESSION and ROSE SESSION,
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Petition for a Writ of Certiorari to the
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for the Third Circuit

To the Honorable, the Chief Justice and
the Associate Justices of the Supreme
Court of the United States

Petitioners, Miller Session and Rose
Session, respectfully pray that a Writ of
Certiorari issue to review the Judgment
Order of the United States Court of Ap-
peals for the Third Circuit entered on
August 6, 1986, affirming the Order of the

United States District Court for the District of New Jersey, which held that a stevedore's lien for compensation benefits paid pursuant to the Longshoremen's and Harbor Workers' Compensation Act no longer was a subrogation lien, and in support thereof represents as follows:

OPINIONS BELOW

The Judgment Order of the United States Court of Appeals for the Third Circuit, which is not yet officially reported, is reproduced in the Appendix hereto (1a). The opinion of the United States District Court for the District of New Jersey, is officially reported at 618 F. Supp. 325 (D.N.J. 1985), and is reproduced in the Appendix hereto (5a).

JURISDICTION

The Judgment Order of the United States Court of Appeals for the Third

Circuit was entered on August 6, 1986. Thereafter, on September 3, 1986, a Petition for Rehearing was denied (3a). The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

STATUTORY PROVISIONS INVOLVED

New Jersey Tort Claims Act
N.J.S.A. 59:9-2e

e. If a claimant receives or is entitled to receive benefits for the injuries allegedly incurred from a policy or policies of insurance or any other source other than a joint tortfeasor, such benefits shall be disclosed to the court and the amount thereof which duplicates any benefit contained in the award shall be deducted from any award against a public entity or public employee recovered by such claimant; provided, however, that nothing in this provision shall be construed to limit the rights of a beneficiary under a life insurance policy. No insurer or other person shall be entitled to bring an action under a subrogation provision in an insurance contract against a public entity or public employee.

Longshoremen's and Harbor Workers'
Compensation Act
Section 33(f), 33 U.S.C. Sec. 933(f)

(f) If the person entitled to compensation institutes proceedings within the period prescribed in section 33(b), the employer shall be required to pay as compensation under this chapter a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the net amount recovered against such third person. Such net amount shall be equal to the actual amount recovered less the expenses reasonably incurred by such person in respect to such proceedings (including reasonable attorneys fees).

Section 33(g), 33 U.S.C. Sec. 933(g)

(g) If compromise with such third person is made by the person entitled to compensation or such representative of an amount less than the compensation to which such person or representative would be entitled to under the Act, the employer shall be liable for compensation as determined in subdivision (f) only if the written approval of such compromise is obtained from the employer and its insurance carrier by the person entitled to compensation or such representative at the time of or prior to such compromise on a form provided by the Secretary and filed in the office of the deputy commissioner having jurisdiction of such injury or death within thirty days after such compromise is made.

STATEMENT OF THE CASE

This is an action for a declaratory judgment brought by an employee -- here petitioner Miller Sessions -- to determine whether his employer -- here respondent I.T.O. Corporation of Ameriport (hereafter "I.T.O.") -- may assert a lien for workmen's compensation benefits paid to the employee against the employee's recovery in a third-party tort action brought against an agency of the State of New Jersey.

Petitioner's third-party tort action was brought against the South Jersey Port Corporation, an agency of the State of New Jersey, under the provisions of the New Jersey State Torts Claims Act, N.J.S.A. 59:1-1 et seq., a comprehensive statutory program dealing with the waiver of the defense of sovereign immunity by the State of New Jersey and its agencies. Under

this statutory program, the right to assert subrogation liens is expressly abolished; instead the benefit of payments from sources such as workmen's compensation payments inures to the State to reduce the State's liability for damages rather than being repaid to the employer, see N.J.S.A 59:9-2e.

The workmen's compensation benefits being paid to petitioner were being paid under the provisions of the Longshoremen's and Harbor Worker's Compensation Act, as amended, 33 U.S.C. Sec. 901 et seq. Therefore, the action involves the interpretation of rights arising under the Longshoremen's and Harbor Workers' Compensation Act, and federal jurisdiction exists under 28 U.S.C., Sec. 1331.¹

The case was determined on

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1. The District Court's characterization of the action as being a maritime tort action (5a) is patently incorrect.

petitioner's motion for summary judgment, the parties being in agreement that there was no dispute of material fact and that the issue was solely one of law. The operative facts are as follows:

Petitioner, Miller Session was injured on August 17, 1981, while working as a longshoreman for respondent, I.T.O., a stevedoring company. At the time I.T.O. was engaged in discharging cargo from a vessel that was docked at the Camden Marine Terminal in Camden, New Jersey. The Camden Marine Terminal is owned and operated by the South Jersey Port Corporation, a corporation formed and operated as an agency of the State of New Jersey.

Petitioner was injured while working on the pier, not on the vessel, his injuries being caused by a defective condition on the pier. However, since he was

injured while working in connection with the discharging of cargo from a vessel, he was entitled to receive, and in fact did receive and still is receiving workmen's compensation benefits from respondent, I.T.O., under the Longshoremen's and Harbor Workers' Compensation Act.

In 1972, the State of New Jersey had enacted the New Jersey State Tort Claims Act, N.J.S.A. 59:1-1, et seq., as a comprehensive statutory program dealing with the defense of sovereign immunity in tort actions against the State and its agencies. The Tort Claims Act contains numerous provisions dealing with the giving of notice of claims against the State and its agencies and governing the bringing of suits on such claims. Since the South Jersey Port Corporation is an agency of the State of New Jersey, tort claims against it are subject to the

provisions of the New Jersey State Tort Claims Act, supra.

Pursuant to the applicable provisions of the New Jersey State Tort Claims Act, petitioner gave notice to the South Jersey Port Corporation that he was claiming that his injuries in the accident of August 17, 1981, were caused by its negligence, and subsequently brought suit against the South Jersey Port Corporation to recover damages for his injuries.

Prior to the suit against South Jersey Port Corporation being reached for trial, a settlement conference was held before the Court. In these settlement discussions it was assumed that, pursuant to Section 9-2e of the New Jersey State Tort Claims Act, N.J.S.A. 59:9-2e, plaintiff's employer, I.T.O., would not be entitled to assert a lien for the compensation benefits which it had paid

and was continuing to pay to petitioner.

In this regard N.J.S.A. 59:9-2e provides:

"e. If a claimant receives or is entitled to receive benefits for the injuries allegedly incurred from a policy or policies of insurance or any other source other than a joint tortfeasor, such benefits shall be disclosed to the court and the amount thereof which duplicates any benefit contained in the award shall be deducted from any award against a public entity or public employee recovered by such claimant; provided, however, that nothing in this provision shall be construed to limit the rights of a beneficiary under a life insurance policy. No insurer or other person shall be entitled to bring an action under a subrogation provision in an insurance contract against a public entity or public employee." (Emphasis supplied)

At the settlement conference, it was recommended that petitioner accept the sum of \$45,000.00 in settlement of his action against the South Jersey Port Corporation on the understanding that there would be no subrogation lien for the workmen's compensation payments he had received, and that petitioner would continue to be

entitled to receive compensation benefits from I.T.O. under the Longshoremen's and Harbor Workers' Compensation Act so long as he remained disabled. However, before completing the settlement, counsel for petitioner contacted I.T.O. to ascertain its position with respect to its compensation lien and its obligation to continue to pay compensation benefits in the event the third-party tort action was settled.

I.T.O. responded that, in its view, the New Jersey Tort Claims Act did not bar it from asserting a lien for benefits paid under the Longshoremen's and Harbor Workers' Compensation Act, and that it would treat any settlement of petitioner's third-party tort action as a settlement without its approval under Section 33(g) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. Sec. 933(g),

and would immediately terminate the payment of compensation benefits.

It was to resolve this conflict between respondent's claimed right to assert a lien for its compensation payments, and the provision of the New Jersey State Tort Claims Act that the benefit of such payments should go to the State, that this suit for a declaratory judgment was brought.

The District Court, subsequently affirmed by the Court of Appeals, ruled in favor of I.T.O., holding (1) that I.T.O. could assert a lien for compensation payments made under the Longshoremen's and Harbor Workers' Compensation Act notwithstanding the provision of N.J.S.A. 59:9-2e abolishing the right to subrogation in actions governed by the New Jersey State Tort Claims Act, and (2) that petitioner's settlement of his third-party

tort action without I.T.O.'s approval would terminate I.T.O.'s obligation to continue to pay compensation benefits.

To reach these conclusions, the District Court recognized that it had to find that I.T.O.'s compensation lien was not a subrogation lien. Therefore, the Court began its reasoning by stating --

"Our holding does not comport with the rationale which led to the judicial establishment of the stevedore's lien." (18a) (Emphasis supplied)

By this simple phrase, the District Court cast aside this Court's holding in Bloomer v. Liberty Mutual Insurance Co., 445 U.S. 74, 79, 63 L.Ed.2d 215, 221 (1980), and the decision in The Etna, 138 F.2d 37, 39-40 (3rd Cir. 1943), that the stevedore's lien was based on the principle of subrogation.

The District Court then stated that it was guided in its decision by the

holding in United States v. Lorenzetti, 467 U.S. 167, 81 L.Ed.2d 134 (1984)(21a), which led it find in the 1984 amendment to Section 33(f) of the Longshoremen's and Harbor Workers' Compensation Act a statutory requirement permitting the employer to assert a compensation lien against any third-party recovery made by an employee (after the deduction of attorney's fees and costs of litigation)(17a). In this regard, Section 33(f) of the Longshoremen's and Harbor Workers' Compensation Act, as amended in 1984 provides (the underlined portions show the changes added by the 1984 amendments):

"(f) If the person entitled to compensation institutes proceedings within the period prescribed in section 33(b), the employer shall be required to pay as compensation under this chapter a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the net

amount recovered against such third person. Such net amount shall be equal to the actual amount recovered less the expenses reasonably incurred by such person in respect to such proceedings (including reasonable attorneys' fees)."

Although not stated with great precision, the District Court's holding is that the 1984 amendment to Section 33(f) of the Longshoremen's and Harbor Workers' Compensation Act, and, in particular, the reference to "net amount recovered" (17a), operated to change the stevedore's lien from a subrogation lien under Bloomer and The Etna, to a general statutory right of recovery similar to the interpretation given to Section 8132 of the Federal Employees Compensation Act, 5 U.S.C. Sec. 8132, in Lorenzetti.

Overlooked in this rationale was the impact of the holding on the State of New Jersey, for if I.T.O.'s lien is not a subrogation lien, and if petitioner may

not retain his compensation benefits, then there is no duplicate payment to him to deduct from the State of New Jersey's liability for damages, which is correspondingly increased.

REASONS WHY THE WRIT SHOULD BE GRANTED

I. The Decision Below --

- A. Is In Conflict With The Holdings In *Bloomer v. Liberty Mutual Insurance Co.*, 445 U.S. 74, 63 L.Ed.2d 215(1980), and *The Etna*, 138 F.2d 37 (3rd Cir. 1943), That The Stevedore's Lien Is A Judicially Created Lien Based On The Principle Of Subrogation;
- B. Misapplies This Court's Decision In *United States v. Lorenzetti*, 467 U.S. 167, 81 L.Ed.2d 134 (1984);
- C. Misinterprets The Purpose Of The 1984 Amendment To Section 33(f) Of The Longshoremen's And Harbor Workers' Compensation Act; and
- D. Improperly Negates Section 9-2e Of The New Jersey State Tort Claims Act.

As previously set forth, supra pp.9-10, Section 9-2e of the New Jersey State Tort Claims Act, N.J.S.A. 59:9-2e, is specific in abolishing the right of subrogation in tort actions against the State of New Jersey and its agencies. This provision barring subrogation was the result of an expressed legislative

determination that, as between the State of New Jersey and its agencies, on the one hand, and a private employer or insurance carrier, on the other, the private employer or insurance carrier was in a better position to bear the expense of the employee's injury than was the State and, therefore, should not be relieved from that obligation at the expense of the State. Thus, the Comment to N.J.S.A. 59:9-2e states:

"Subrogation is prohibited in subparagraph (e) in an effort to limit the exposure to liability of public entities. This provision is consistent with the 'no duplicate benefits' approach in the act and reflects a recognition that profit-making insurance companies are in a better position to withstand losses which they contract for than are the already economically burdened public entities." (Emphasis supplied)

The decision below, by holding the the stevedore's lien is not a subrogation lien, thwarts this legislative policy, for

if the compensation payments have to be paid back to the employer, then the injured employee will not be in receipt of any "duplicate" payments to credit against his damage award against the State or State agency.

The Longshoremen's and Harbor Worker's Compensation Act does not contain any provision specifically granting an employer a lien on an employee's third-party recovery. However, it has long been established that such a lien exists based solely on the principle of subrogation. The leading case is The Etna, 138 F.2d 37 (3rd Cir. 1943), in which the Court stated, 138 F.2d at 39-40:

" . . . we think that appellant misconceives both the purpose and the scope of that provision and entirely ignores the right to subrogation which under equitable principles, attaches where one, not acting officiously, pays money on account of a legal obligation resting upon him for the imposition whereof another is held pecuniarily responsible. . . .

"As we have seen, Sec. 33(a) gives the injured employee a right to elect either 'to receive . . . compensation or to recover damages against (a) third person' where the injury for which compensation becomes payable is the fault of a third person. But Sec. 33(a) does not provide that the employee shall have a right to both compensation from his employer and damages from responsible third persons."

The holding of The Etna that the compensation lien was based on the principle of subrogation, coupled with the idea that the employee was not entitled to receive a double recovery, has been cited in numerous subsequent cases, including, most recently, this Court's decision in Bloomer v. Liberty Mutual Insurance Co., 445 U.S. 74, 63 L.Ed.2d 215 (1980), in which this Court noted:

" . . . the lower Courts, however, interpreted the Act to require that the stevedore be reimbursed for his compensation payment out of the sum recovered from the third party. Congress was understood not to contemplate double recovery on the longshoreman's part, and the

stevedore did not, therefore lose the right to reimbursement for its compensation payment. See, e.g., The Etna, 138 F.2d 37 (C.A. 3 1943);
. . . ."

In the instant case, the District Court declined to follow the authority of Bloomer v. Liberty Mutual Insurance Co., supra, and The Etna, supra, with the simple comment that its holding did "not comport with the the rationale which led to the judicial establishment of the stevedore's lien" (18a). However, such long standing authority interpreting an important federal statute such as the Longshoremen's and Harbor Workers' Compensation Act should not be lightly disregarded. The failure of both the Third Circuit and the District Court to follow the decisions in Bloomer and The Etna, coupled with the holding that the stevedore's lien no longer rests on the principle of subrogation, in and of

itself, is such a significant departure from prior law, as to warrant consideration by this Court.

The District Court stated that it was "guided" in its holding "by the case of United States v. Lorenzetti," supra (21a). In Lorenzetti, this Court held that Section 8132 of the Federal Employees' Compensation Act, 5 U.S.C. Sec. 8132, created a general right of recovery for the federal government of compensation benefits paid to injured employees from third-party damage recoveries which was independent of the principle of subrogation. Thus, in Lorenzetti, this Court noted, 81 L.Ed.2d at 142:

"Section 8132 does not confine the United States to the rights of a subrogee with respect to the specific classes of expenses paid by it to injured employees under FECA; instead, it expressly creates a general right of reimbursement that obtains without regard to whether the

employee's third-party recovery includes losses that are excluded from FECA coverage."

The Lorenzetti decision was not an expression of a broad judicial philosophy or policy; rather, as this Court was careful to indicate, it was simply a result mandated by the specific language of the statute which the Court was construing. Thus, this Court stated in Lorenzetti, 81 L.Ed.2d at 144:

"The Court of Appeals believed that allowing the United States to recover in this case would be inconsistent with Congress' declared intent that federal employees 'be treated in a fair and equitable manner' under the FECA and that the United States 'strive to attain the position of being a model employer. S Rep. No.93-1081, p.2 (1974). However useful these general statements of congressional intent may be in resolving ambiguities in the statutory scheme, they are not a license to ignore the plain meaning of a specific statutory provision." (Emphasis supplied)

The District Court, in stating that it was "guided" in its holding by the

decision in Lorenzetti, gave Lorenzetti a far broader reading than simply being an interpretation of Section 8132 of the FECA. Rather, the District Court appears to be viewing Lorenzetti as reflecting a judicial philosophy that in those instances where an employer's right to assert a compensation lien comes into conflict with tort reform legislation, such as the New Jersey Tort Claims Act, which would bar the right of subrogation as a means of rearranging the financial impact of accident compensation, the courts should endeavor to find an interpretation of the compensation act which would preserve the employer's right to assert a compensation lien.

Tort reform legislation, such as automobile no-fault legislation and enactments similar the New Jersey State Tort Claims Act, which seek to reduce

insurance costs by eliminating subrogation claims and allowing damage awards only for amounts in excess of an injured employees' compensation benefits, is becoming increasingly common. There is nothing in the Lorenzetti decision which suggests that it was intended to impede such developments in the absence of a clear statutory mandate to the contrary which, we submit, is not present here. To the extent that the decision below reflects an interpretation of the Lorenzetti decision as being antagonistic to such tort reform legislation, it reflects a misinterpretation of the Lorenzetti decision which should be corrected by this Court.

The crux of the decision below is the District Court's holding that the 1984 amendment to Section 33(f) of the Longshoremen's and Harbor Workers' Compensation Act manifested a

Congressional intent to change the stevedore's compensation lien from a lien based on the principle of subrogation to a statutory general right of recovery analogous to Section 8132 of FECA as interpreted in the Lorenzetti decision. This holding is patently in error for several reasons.

Initially, it is significant that nowhere in the legislative history accompanying the amendment to Section 33(f) is there any mention of such a legislative intent, nor is there anything to suggest that Congress even recognized that it was enacting such a significant change in the nature of the compensation lien.

Secondly, it is abundantly clear that the amendment Section 33(f) was addressed to a far different problem -- a problem which arose in the wake of the Bloomer

decision. Bloomer had held that a longshoreman's attorney could not charge the stevedore with any part of his fees or costs incurred in recovering the compensation lien in a third-party action; rather, the entire lien had to be repaid to the stevedore from the proceeds of the third-party action before any distribution could be made to the injured longshoreman.

Following the Bloomer decision, cases came up where the third-party recovery was insufficient to satisfy both the attorney's fees and costs, and the stevedore's compensation lien, and the question came up as to who was to have priority of payment, i.e., would the stevedore be paid his lien first with whatever balance that remained going to satisfy attorney's fees and cost, or would the attorney's fees and costs be paid first with whatever balance that remained

going to the stevedore to satisfy its lien. The 1984 amendment to Section 33(f) resolved this problem by providing that the attorney's fees and cost would have priority of payment over the stevedore's lien. The history of this issue is set forth at length in Ochoa v. Employers National Insurance Co., 754 F.2d 1196 (5th Cir. 1985). There is absolutely no basis in the statutory language, legislative history or otherwise for concluding that the 1984 amendment to Section 33(f) was addressed to anything other than this particular problem.

Nor is the language of Section 33(f) "unambiguous" as stated in the District Court's opinion. First of all, Section 33(f) deals only with the employer's liability for compensation; it does not create a compensation lien. Secondly, unlike Section 8132 of FECA in the

Lorenzetti case, nowhere in the Longshoremen's and Harbor Workers' Compensation Act is there a statutorily mandated compensation lien. The only lien that has ever existed is the judicially recognized subrogation lien as set forth initially in the decision in The Etna, supra. Section 33(f) can and should be interpreted, and, indeed, only makes sense when interpreted as defining the employer's liability for compensation where a compensation lien is found to exist based on the principle of subrogation -- the only basis on which such a lien ever has been found to exist.

The decision below is based on a strained and illogical interpretation of Section 33(f) of the Longshoremen's and Harbor Workers' Compensation Act. It operates to negate an important aspect of tort reform legislation of the State of

New Jersey relating to the sovereign immunity of the State in tort litigation. It misapplies the rationale of this Court's decision in United States v. Lorenzetti, supra, and is in direct conflict with the decisions in Bloomer v. Liberty Mutual Insurance Co., supra, and The Etna, supra, which held that the stevedore's compensation lien was based on the principle of subrogation. The decision below impacts significantly on the rights of injured employees to bring third-party actions and on the State of New Jersey in tort actions brought against it. Accordingly, it is submitted that a Writ of Certiorari should issue to review all these issues.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that a Writ of Certiorari should issue to review the decision and judgment of the court below.

Respectfully submitted,

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